

83-826

Office - Supreme Court, U.S.

FILED

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ALEXANDER L. STEVAS.

In the Supreme Court of the United States

October Term, 1983

HAMED & SALEM, INC.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Sixth Circuit

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1276 W. 3rd Street  
Cleveland, Ohio 44113  
(216)

October 1, 1983

## QUESTIONS PRESENTED

1. Whether the District Court & the Sixth Circuit erred in upholding the agency in its decision disqualifying Plaintiff-Appellee from participation in the Food Stamp Program in light of new regulations, effective January 1, 1979, promulgated under the Food Stamp Act of 1977, which regulations were in effect at the time of the court's decision but not at the time of the administrative action?

11. Did not the Congress in passing the 1977 Food Stamp Act, intend that it should be considered whenever procedurally it was feasible - not violation-wise as the Court has indicated?

III. Did not the Court fail to recognize that the Petitioner was severely prejudiced by the delay in the implementation of the 1977 Food Stamp Act?

II

LIST OF ALL PARTIES

Parties Petitioner:

Hamed & Salem, Inc. \*

Parties Respondent:

United States of America

\*Hamed & Salem, Inc. has no parent companies, subsidiaries, or affiliates.

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HAMED & SALEM, INC.

Petitioner,

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UNITED STATES OF AMERICA

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

For the Sixth Circuit

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The Petitioner, Hamed & Salem, Inc.

Respectfully asks that a Writ of Cer-

tiorari issue to review the final op-

inion of the United States Court of

Appeals for the Sixth Circuit entered

in this proceeding on July 25, 1983.

Rehearing was denied on October 10, 1983

which action overruled and denied Pet-

2.

itioner's Petition for Rehearing En Banc of the Court's decision entered July 25, 1983.

#### OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is not reported as of this date; the District Court for the Northern District of Ohio's opinions are unreported. All opinions appear in the Appendix hereto.

#### JURISDICTION

The opinion of the court of appeals for the Sixth Circuit was entered on July 25, 1983. A Timely Petition for Rehearing En Banc was denied on October 10, 1983, and this petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1)



## STATUTORY PROVISIONS INVOLVED

United States Code, Title 7 §2011,  
et seq:

The Food Stamp Act of 1964 and its various amendments until the effective date of 7 U.S.C. §2023, the Food Stamp Act of 1977. (Effective October 11, 1979) (promulgated January 1, 1979). (The above provisions deemed pertinent are set out in detail in the appendix of this petition.)

## STATEMENT OF THE CASE

Hamed & Salem, Inc. is a retail grocery store in the city which carries a full line of grocery items, and has a gross income in excess of three million dollars. It was authorized by the Department of Agriculture, Food and Nutrition Service (FNS) to be a participant in the Food Stamp Program.

As a result of an investigation, the Department charged Hamed & Salem, Inc. with violations of the Food Stamp Act, 7 U.S.C. §2011 et seq., and the regulations promulgated pursuant thereto. Petitioner was afforded the opportunity to and did reply to the charges. Subsequently a letter of disqualification for a period of one year was issued. The attorney for the owner orally presented further arguments in favor of his client to the Food Stamp Review Officer. The Review Officer con-

cluded, however, the initial charges and the disqualification from the Food Stamp Program was appropriate.

Thereafter, counsel for Hamed & Salem, Inc. filed a complaint in the United States District Court, a "court of record having competent jurisdiction," seeking judicial review of the determination made by the secretary pursuant to 7 U.S.C. §2022.

The U.S. District Court conducted a trial de novo in the within case. The Court concluded that Petitioner had committed violations of the Act and, therefore, affirmed the Administrative findings.

After deciding the merits of the case favorable to defendant, United States, the court noted in its order that it had no authority to review the sanction, a one year period of disqualification,

despite a new provision of the Act which allows the Secretary, if he finds a retail or wholesale store who is a participant in the Food Stamp Program to be in violation provisions of the Food Stamp Act and its regulations, to impose a civil monetary penalty for violations if the Secretary determines that the store's disqualification would cause hardship to the food stamp recipients.

Prior to the passage of this provision, the Food Stamp Act and its regulations did not provide for the possibility of a monetary penalty upon the Secretary's finding of a violation, only disqualification of the participant store for varying periods of time, depending on the nature and frequency of the violation. 7 C.F.R. 272.6 (a).

## REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Court of Appeals, in its order cites the case of Kulkin v. Bergland, 626 F. 2d 181 (1st Cir. 1980) as authority for its decision. Counsel for Appellant suggests that the case should not be contrasted with the case at hand. Kulkin, supra, was a summary judgment with no dispute as to material facts and no denial as to violations - clearly there was no genuine issue for trial. The Court said that were it to review the sentence, it would not disturb it.

Clearly, East 105th Street falls within the new guidelines under the 1977 Food Stamp Act. (See Kulkin, supra, p. 10 full). Counsel for Appellant would direct the Court's attention to the case of Jedatt v. U.S.D.A., 488 F. Supp. 261 (E.D. Mich. 1980) - a District Court decision within

the 6th Circuit boundaries which clearly is contrary to Kulkin. In that case the Court wanted the agency to indicate why a fine should not be imposed despite pre-act violation.

This Court further cites the case of Addison sawmor, inc. v. United States, 657 F. 2d 80 (6th Cir. 1981). Addison can be clearly distinguished on the basis that procedurally, not only had the violation been pre-1977 but all administrative penalty hearings and assessments were before the effective date of the 1977 Act.

to allow time for the failure of the Department expeditiously to implement the regulations violates Section 1303 and compels the conclusion that the new regulations should have been applied in this case.

(See plaintiff's argument, Cass Corridor food coop v. u.s., 512 F. Supp. 925 (1981).

In the instant case, the Court could clearly conclude that Petitioner would be irreparably harmed by the failure of the

department to "expeditiously implement the regulations" as required by the Act of 1977 itself. (See Calvert Cliffs coordinating committee, inc., v. U.S., 449 F. 2d 1109 (1971); Anton v. Bergland, No. 78-2173 (1979).

The Anton case, while not directly concerned with our problem, nonetheless said regulations under the Food Stamp Act of 1977 was so compelling that relief was granted.

The Court in the Cass Corridor case rejected this argument. However, it did so on this basis on the question not having been raised before the judicial trial. In the instant case it has been the contention of Petitioner that it was entitled to the benefits of the 1977 Act - even at the lowest administrative level. (See Cass Corridor, p. 930, supra.)

In the Cass Corridor case, although ruling in favor of the government, the Court clearly had reservations when it stated:

The Congress clearly did not want the administrative proceedings disturbed, however, in the case at hand, the first penalty assessment did not occur until February 22, 1979 - two months after the effective date. Implementation of the act at this level could not possibly effect the orderly administration of justice.

II. Certainly one must conclude that the delay in the promulgation of the regulations under the 1977 Act prejudiced East 105th Street and denied Petitioner proper evaluation. (See Jedatt, supra). It can not be denied that there is a legislative preference under the 1977 Act for imposition of a civil penalty, rather than disqualification. The provisions of the 1977



which the 6th Circuit relied upon should not be determinative of this case. (See Sec. 1303, Paragraph (a) and (b)0. These provisions were enacted with the expectation that the Act would be implemented long before it in fact was. The Act was to be promptly implemented.

"as expeditiously as possible consistent with the efficient and effective administration of the food stamp program," Pub. L. 95-113, § 1303, supra, and that "(final regulations would be issued by March 1, 1977 (sic, 1978 (?)), "though it was acknowledged that the March date was "somewhat optimistic." H.R. Rep. No. 95-345 at 427, reprinted in (1977) U.S. Code Cong. & Ad. News 1941, 2355. Further, the anticipated repeal date of the 1964 Act was July 1, 1978, in order.

In conclusion, the decision of the Department of Agriculture will stand, not because it would be the decision of this court were it deciding how to implement the new regulations and not because it best reflects the policy interests underlying the enactment of new, more

lenient penalty provisions, but because the Department was entitled, under the terms of the implementation statute, to adopt this method of administering the food stamp program.

Finally, Petitioner would suggest to the Court that the Court failed to consider whether the proper guidelines were implemented at the administrative level.

In the instant case, the identity of the parties allegedly committing the violations was never clearly established. Paragraph III-B-4 of FNS Instructions explains how to determine whether a food stamp violation was committed as a matter of store policy. It states:

The complete case record shall be analyzed to determine if violating the program was store policy. At least one of the following factors has to be present before violations can be considered store policy:

a. Substantial participation by the owner, responsible members of his family, or the management in the violations,

b. Admissions by the owner, management, or clerk that instructions were given to violate the program,

c. Physical proof, such as written instructions from the owner or management, indicating the violations were permitted as store policy,

d. A combination of violative evidence and previous compliance action which shows that consistent violations continued despite a reasonable attempt by FNS personnel to correct the situation by making the owner or management aware that violations were probably occurring in the store, and

e. Any other evidence which shows that the owner of management had to be aware the violations were occurring and did nothing to stop them.

The Court, in the case of Willy's Grocery v. U.S., 656 F. 2d 24 (1981) while reversing the lower Courts decision to remand to the administrative level, did hold that the guidelines

must be applied. East 105th St., contends they were not in the instant case.

III. In conclusion the Appellant contends that the legislative intent is clear. The Food Stamp Act shall not impede the 1964 Act procedurally and administratively. The legislature never intended that any violation prior to the effective date of January 1, 1979 should be treated under the 1964 Act. The first formal administrative decision announcing a penalty was made virtually two months after the effective date of the new Act.

The Court, in the case of Wolffe v. U.S. Dept. of Agriculture, (455 F. Supp. 169; 1978) initiated a new and very relevant decision so far as review of an administrative decision is concerned. The Court, in confining its

remarks solely to the penalty of the review officer, said:

"The penalty was in excess of Departments own informal guidelines. The Department abused its discretion and acted in an arbitrary and capricious manner."

It appears that this case has forged a bridge between the decisions which had separated Cross v. U.S., supra, and the judicial forces of Martin v. U.S., (459 F. 2d 300; 1971).

Prior to Wolffe, (supra), the "arbitrary and capricious" standard had been applied solely to the findings relevant to the violations themselves. Wolffe has taken the position that even though the administrative body had, in fact, found that the violations did occur, the severity of the penalty, in itself, may fall within the "arbitrary and capricious" standard and the penalty should be reduced accordingly. The Court, in conclusion stated;

"....it must be concluded that the Department abused its discretion and acted in an arbitrary and capricious manner. The one year suspension imposed is severe on its face. It exceeds most of the other penalties imposed in this area, even those given for serious violations. Further, it is in excess of the Department's own informal guidelines." (wolffe, supra, p. 172).

Appellee would call attention to the following cases, all of which substantiate the claim that the penalty in this case is too severe. The allegation is based not only on these cases, but on the intent of Congress in passing the Food Stamp Act of 1977.

Congress, in passing the Act calling for Civil Money penalties said:

any approved retail food store or wholesale food concern may be disqualified for a specified period of time from further participation in the food stamp program, or subjected to a civil money penalty of up to \$5,000 for each violation if the Secretary determines that its disqualification would cause hardship to food stamp households on a finding made as specified in the regula-

tions, that such store or concern has violated any of the provisions of this chapter or the regulations issued pursuant to this chapter. 7 U.S.C. §2021.

The uncontroverted testimony at the trial from both government and East 105th witnesses was that the surrounding households would suffer severe hardship E. 105 St. were to go out of business. Further testimony indicated the business could not endure more than a few months without food stamps.

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October 1, 1983

OPINION OF THE UNITED STATES COURT OF

APPEALS FOR THE SIXTH CIRCUIT

(Filed July 25, 1983)

No. 81-3735

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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HAMED & SALEM, INC.

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA  
DEPARTMENT OF AGRICULTURE

Defendant-Appellee

---

BEFORE: EDWARDS, Chief Judge; LIVELY  
and KRUPANSKY, Circuit Judges.

The plaintiff appeals from a judgment of the district court upholding the decision of the U. S. Department of Agriculture finding that the plaintiff violated provisions of law relating to the acceptance of food stamps in payment for ineligible



items and disqualifying the plaintiff from participating in the food stamp program for one year. The Agriculture Department found that the violations took place in September 1978 which was between the date of enactment of the Food Stamp Act of 1977 and its effective date, January 1, 1979. Under the 1964 Food Stamp Act which was in effect when the violations took place disqualification was the only sanction permitted. The 1977 Act has a provision for the imposition of a fine as an alternative disqualification.

On appeal the plaintiff argues that he was entitled to have the penalty in his case imposed under the 1977 Act, that is the Agriculture Department should have considered imposing a fine rather than disqualification. This court construes the 1977 Act to provide that all violations which occur prior to its effective date, January 1, 1979 be disposed

of under the provisions of the 1964 Act.  
Addison Savmor, Inc. v. United States,  
657 F. 2d 80 (6th Cir. 1981). See also  
Kulkin v. bergland, 626 F. 2d 181 (1st  
Cir. 1980).

ORDER OF THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT  
DENYING MOTION FOR REHEARING  
(Filed October 10, 1983)

No. 81-3735

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

HAMED & SALEM, INC.

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA  
DEPARTMENT OF AGRICULTURE

Defendant-Appellee

---

BEFORE: LIVELY, Chief Judge; EDWARDS and  
KRUPANSKY, Circuit judges.

No judge in regular active service  
on the court having requested en banc con-  
sideration, the petition for rehearing  
filed herein by the plaintiff-appellant  
has been referred to the hearing panel.

Upon consideration the court concludes that the issues raised in the petition for rehearing were fully considered and decided upon the original submission of the appeal and that rehearing is not required.

The petition for rehearing is denied.

UNITED STATES CODE

7 U.S.C. 2021 Civil money penalties and  
(1977 Food disqualification of retail  
Stamp Act) food stores and wholesale  
food concerns.

Any approved retail food store or whole-sale food concern may be disqualified for a specified period of time from further participation in the food stamp program, or subjected to a civil money penalty of up to \$5,000 for each violation if the Secretary determines that its disqualification would cause hardship to food stamp households on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this chapter or the regulations issued pursuant to this chapter. Such disqualification shall be for such a period of time as may be determined in accordance with regulations issued pursuant to this chapter. The action of

disqualification of the imposition of a civil money penalty shall be subject to review as provided in Section 2023 of this title.

7 U.S.C. 2011 Disqualification of re-  
Regulation      tail food stores, meal  
272.6              services, and wholesale  
                    food concerns.

(a) Any authorized retail food store, authorized meal service, or authorized wholesale food concern may be disqualified from further participation in the program by F.N.S. for a reasonable period of time, not to exceed 3 years, as FNS may determine, if such firm fails to comply with the Food Stamp Act or the provisions of this part; except that, if the disqualification may be continued until such claim is paid. Any firm which has been so disqualified and which desires to be reinstated upon the end of the period of disqualification or at any time

thereafter shall file a new application so that FNS may determine whether reinstatement is appropriate under the provisions of this part. Such an application may be filed starting 10 days before the end of the period of disqualification.